International Brotherhood of Electrical Workers, Local Union No. 98, AFL–CIO *and* Swartley Brothers Engineers, Inc. Case 4–CD–1079

September 12, 2002

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The charge in this Section 10(k) proceeding was filed on January 11, 2002, by Swartley Brothers Engineers, Inc. (Swartley Brothers or the Employer), alleging that the Respondent, International Brotherhood of Electrical Workers, Local Union No. 98, AFL–CIO (Local 98 or the Union), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to its own unrepresented employees. The hearing was held on May 2, 2002, before Hearing Officer Anne C. Ritterspach.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

Swartley Brothers, a Pennsylvania corporation with its principal place of business in Lansdale, Pennsylvania, is an electrical contractor engaged in the commercial and residential construction industries. During the 12 months preceding the hearing, Swartley Brothers provided services valued in excess of $50,000 directly to customers located outside the Commonwealth of Pennsylvania. The parties stipulate, and we find, that Swartley Brothers is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Local 98 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

Swartley Brothers is an electrical contractor that performs industrial, commercial, residential, and cellular electrical work in various Pennsylvania counties, including Philadelphia, Bucks, Chester, Delaware, and Montgomery. Swartley Brothers has been in business since 1928, and its employees have never been represented by a labor organization.

In 2001, Cello Partnership d/b/a Verizon Wireless hired general contractor Russell Palermo Construction (Palermo) to construct and install cellular communications facilities on the roof of the Riverside Presbyterian Apartments, 158 North 23rd Street, in the city of Philadelphia (23rd Street project). Palermo in turn hired Swartley Brothers to perform the electric work on the 23rd Street project. The electric work encompassed installing a 200 amp, single-phase feeder with a metered socket on the first or ground-level floor to a communications shelter built on the roof, and included the installation of conduits for phone wires and a grounding conductor.

On January 4, 2002, union-represented crane operators and operating engineers, who were employees of other subcontractors, were on site at the 23rd Street project preparing to lift structural steel to the roof of the apartment building to construct the new communications shelter. Swartley Brothers' employees were not scheduled to work that day. Some time between 10 and 11 a.m., Local 98 business agent, Ray Della Vella, came to the 23rd Street project and struck up a conversation with Palermo's field supervisor, Richard Cushman. Della Vella asked Cushman the identities of the subcontractors that had been hired to perform the work on the site, and when Cushman told Della Vella that Swartley Brothers was the electrical subcontractor, Della Vella reacted antagonistically. According to Cushman, Della Vella became irate and told Cushman that Swartley Brothers was a nonunion contractor and that "he's not supposed to be doing electric work in the City of Philadelphia." Cushman subsequently informed Della Vella that no electricians were actually on site that day, and that a union electrical contractor had been called by Swartley Brothers to come to the site that day to help defuse the situation. Della Vella responded that neither of those factors made a difference to him, and that "it's just not going to happen today," "it's over."

After Della Vella learned from Cushman that Swartley Brothers was the electric subcontractor on the job, Della Vella approached the crane operator and the operating engineers and spoke with them. No witness testified to the content of Della Vella's conversations with those employees. However, following the brief conversation, the employees stopped working after completing the immediate task they were performing, which was lifting and fastening structural steel to the roof. After speaking with the union-represented employees, Della Vella went to his car, removed some placards, wrote on them, and began picketing an entrance to the 23rd Street project carrying a sign. A short while later, four other people—not employees at the 23rd Street project—arrived and joined Della Vella's picketing.

While Della Vella and his colleagues were picketing, Verizon construction engineer, Peter Burke, approached Della Vella to speak with him about the situation in an effort to resolve it. Burke testified that Della Vella stated that he was "tired of Swartley coming in here in the cloak of darkness and doing this work" and that "this is the straw that broke the camel's back and this can't be

tolerated anymore." Burke asked how he could address Della Vella's problem, and Della Vella responded that the problem would go away if Burke would write a letter on Verizon letterhead stationery stating that Verizon would only use employees represented by Local 98 on its jobs within Local 98's jurisdiction. Burke told Della Vella that Verizon was not opposed to using unionized contractors, but that Verizon uses a competitive bidding process to award jobs to subcontractors, and Swartley Brothers had successfully competed for the electrical work on the 23rd Street project. Burke and Della Vella did not come to an agreement that day about the use of Swartley Brothers on the 23rd Street project, and when Burke left the site at approximately 3 p.m., Della Vella and his 4 colleagues were still picketing. Following the cessation of work on the site that day, work did not resume on the 23rd Street project until January 14, 2002, when, either at Verizon's or Palermo's request, Carr & Duff, a Philadelphia-area electrical contractor that employed Local 98-represented employees, resumed the unfinished electric work that was to be performed by Swartley Brothers.

B. The Work in Dispute

The notice of hearing describes the work in dispute as "[t]he installation by Swartley Brothers Engineers, Inc., of 200 amp single phase services, conduits and the wires therein, for power, telephones and ground conductors within Philadelphia, Bucks, Chester, Delaware, and Montgomery Counties, Pennsylvania."[1]

C. Contentions of the Parties

Swartley Brothers contends that Local 98's oral claims for the work, accompanied by picketing and a demand for a letter agreeing to use only Local 98-represented employees, is sufficient basis for the Board to have reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. With regard to the merits of the dispute, Swartley Brothers asserts that the work should be awarded to its employees based on its preference to utilize its own employees, its past practice of so doing, the fact that it has never been a signatory to an agreement with Local 98, and the economy and efficiency of assigning work to employees already on its payroll.

Local 98 contends that the jurisdictional prerequisites have not been met in this case because its picketing at the 23rd Street project was area standards picketing rather than jurisdictional picketing, and therefore Local 98 has not engaged in any proscribed activity. Local 98 further argues that a broad, areawide award is inappropriate in this case because this matter does not involve a continuous source of controversy between the parties. Finally, Local 98 did not put on any evidence at the hearing nor make argument in its brief addressing the relative merits of assigning the work to either employee group.

D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, it must be satisfied that: (1) there are competing claims for the work; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute.[2] These jurisdictional prerequisites have been met in this case.

On January 4, 2002, Local 98 business agent, Della Vella, told Verizon's general contractor that Swartley Brothers was a nonunion contractor and should not be doing electric work in the City of Philadelphia, that "it's just not going to happen today," and "it's over." Della Vella also spoke with the other employees on the jobsite that day, following which those employees ceased working. Della Vella then established a picket line at the entrance to the jobsite.[3] Finally, when asked how to resolve the situation, Della Vella demanded a letter from Verizon stating that Verizon would only use employees represented by Local 98 on its jobs within Local 98's jurisdiction. On this basis, we conclude that there are competing claims to the work,[4] and we find reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. See, e.g., *Electrical Workers Local 98 (Lucent Technologies)*, 324 NLRB 230 (1997) (oral claims for work accompanied by picketing at the work-

[1] Swartley Brothers and Local 98 declined to stipulate to the description of the work in dispute. It is apparent, however, that their disagreement is with the scope of the award, which we address below, not the description of the disputed work. We find that the record supports the notice of hearing's description of the work in dispute, and we address the relevant geographic area of the disputed work below.

[2] *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422 (2001); *Teamsters Local 259 (Globe Newspaper Co.)*, 327 NLRB 619, 622 (1999); *Laborers Local 113 (Super Excavators)*, 327 NLRB 112, 114 (1998).

[3] There is no evidence that this picketing was area standards rather than jurisdictional, as Local 98 contends in its brief. Cf. *IBEW Local 98 (Fairfield Co.)*, 337 NLRB 793 (2002) (record established that the union's picketing had object of protesting alleged destruction of area standards; peaceful area standards picketing does not constitute a competing claim for work).

[4] At the hearing, counsel for the Union denied that Local 98 claimed the work in dispute. Based on Della Vella's statement and actions at the 23rd Street project on January 4, 2002, however, we conclude that Local 98 did, in fact, claim the work in dispute. In addition, performance of the electric work by the Employer's unrepresented employees "is evidence of a claim to that work by those employees, even absent an explicit claim." *Carpenters Local 13 (Millennium Construction)*, 336 NLRB 1002, 1002 (2001). Thus, there are competing claims for the work, and this jurisdictional prerequisite is met.

site so as not to allow the employer's employees to perform the work constitute sufficient basis to find reasonable cause that a violation of Section 8(b)(4)(D) has occurred); *Electrical Workers Local 400 (E.T. Electrical Contractors)*, 285 NLRB 1149 (1987) (statements that construction project is a "union job" and that nonunion electrical contractor should remove its own employees, accompanied by pickets and demand for letter of agreement to be bound to union's agreement with multiemployer association, constitutes sufficient basis to find reasonable cause that a violation of Section 8(b)(4)(D) has occurred). Furthermore, the parties stipulated, and we so find, that there is no method for voluntary adjustment of the dispute to which all parties are bound. Accordingly, we find that the Board has jurisdiction to resolve this dispute.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

There is no record evidence that Local 98 has been certified by the Board, nor that a Local 98 collective-bargaining agreement with any party covers the work in dispute. In addition, the record shows that Swartley Brothers has never employed employees represented by a union certified by the Board nor has it been a party to any collective-bargaining agreement. Accordingly, we find that the factors of certification and collective-bargaining agreement do not favor awarding the disputed work to either group of employees.

2. Employer preference

Robert Swartley, the owner of Swartley Brothers, testified that the Employer prefers to assign the work in dispute to its own employees. Local 98 does not dispute the Employer's preference in this matter. Accordingly, we find that the factor of employer preference favors an award of the disputed work to the Swartley Brothers' employees.

3. Employer past practice

Swartley testified that his past practice has been to assign electric work to the employees of Swartley Brothers, and Local 98 does not dispute this. Thus, we find that the factor of past practice favors an award of the disputed work to Swartley Brothers' employees.

4. Area and industry practice

There is no record evidence regarding the practice of other area contractors in assigning work similar to the work in dispute. Therefore, we conclude that area and industry practice does not favor an award of the work in dispute to either employee group.

5. Economy and efficiency of operations

There is no record evidence demonstrating that if the disputed work was assigned to a particular employee group, the Employer would be afforded any economy or efficiency in its operations. Therefore, we conclude that an analysis of economy and efficiency of operations does not favor an award of the disputed work to either employee group.

6. Relative skills and training

The record indicates that Swartley Brothers' employees have the requisite skills and training to perform the work in dispute. However, there is no record evidence regarding the skills and training of employees represented by Local 98 to perform the work in dispute. Thus, this factor favors an award of the work in dispute to employees employed by Swartley Brothers.

Conclusions

After considering all the relevant factors, we conclude that Swartley Brothers' unrepresented employees are entitled to perform the work in dispute. We reach this conclusion relying on Swartley Brothers' preference, its past practice, and the relative skills of the employee groups.

Scope of the Award

Swartley Brothers seeks a broad, areawide award in this case that would encompass five counties—Philadelphia, Bucks, Chester, Delaware, and Montgomery Counties—in southeastern Pennsylvania.[5] Local 98 opposes a broad award, and asserts that any award should be limited to the work at the 23rd Street project that gave rise to the instant dispute. In order to grant a broad award in a jurisdictional determination, the Board requires evidence that (1) the disputed work has been a source of controversy in the relevant geographic area and that disputes may recur; and (2) the charged party has the proclivity to engage in wrongful conduct in order to obtain work similar to that in dispute. *Bricklayers (Sesco,*

[5] As noted above, the notice of hearing in this matter sets the geographic scope for the work in dispute as encompassing these five counties in southeastern Pennsylvania.

Inc.), 303 NLRB 401 (1991). We conclude that this case meets the test for the issuance of a broad award.

Both Robert Swartley and Verizon's Peter Burke provided unrebutted testimony that Local 98 has, on other projects in the past 4 years, interfered with the assignment of telecommunications wiring work to the employees of Swartley Brothers. In particular, both witnesses described Local 98's interference with a Verizon project on Chestnut Street in Philadelphia in February 2000. In that case, as in this one, Verizon hired Palermo as a general contractor, who in turn hired Swartley Brothers to perform the wiring installation. Local 98's Della Vella gained unauthorized access to a secure building on the site. Burke testified that Della Vella was asked to leave the property by a Verizon employee, heated words were exchanged between the two, and ultimately Della Vella struck the Verizon employee in the face. Swartley testified that he had a telephone conversation with Della Vella about the Chestnut Street project, during which Della Vella told Swartley that only Local 98-represented employees were to work on the project. As a result of the dispute, Swartley Brothers' employees were replaced on the Chestnut Street project with other employees represented by Local 98. In addition, Swartley Brothers put into evidence a list of five other telecommunications projects that it had worked on over the previous 4 years for carriers such as Cingular, Sprint, and Nextel, and on which it was ultimately replaced because of Local 98's interference with the project.[6]

Verizon's Burke testified that at the time of the hearing in May 2002, Swartley Brothers was performing telecommunications wiring installation on Verizon's Phi-Over project in Philadelphia. In addition, Burke anticipated that Verizon would utilize Swartley Brothers on its other telecommunications projects in the future throughout Philadelphia, Bucks, Chester, Delaware, and Montgomery Counties in southeastern Pennsylvania. Burke testified that this work would involve the installation of 200 amp, single-phase service conduits and wires for power, telephones, and ground conductors. Burke also stated that Local 98 also had jurisdiction throughout the five counties. Swartley confirmed that Swartley Brothers engages in the installation of electrical services throughout these five counties as well.

Based on this record, we conclude that the dispute between Swartley Brothers and Local 98 has been a continuing source of controversy and that the dispute is likely to recur in Philadelphia, Bucks, Chester, Delaware, and/or Montgomery Counties in southeastern Pennsylvania. We further conclude that Local 98 has a proclivity to engage in wrongful conduct in order to obtain work similar to the work in dispute in this case.[7]

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Swartley Brothers Engineers, Inc., who are unrepresented by any labor organization, are entitled to perform the installation of 200 amp single phase services, conduits, and the wires therein, for power, telephones, and ground conductors within Philadelphia, Bucks, Chester, Delaware, and Montgomery Counties, Pennsylvania.

2. International Brotherhood of Electrical Workers, Local Union 98, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force

[6] Robert Swartley testified that the list of six projects that had been interrupted by Local 98 was drawn up at his request by Todd Moyer, Swartley Brothers' director of Cellular Construction. Moyer compiled the data by reviewing Swartley Brothers records kept in the course of regularly conducted business. Local 98 did not object to the admission of this document into evidence.

[7] In this regard, we note not only that the record in this case supports the conclusion that Local 98 has a proclivity to engage in wrongful conduct in order to obtain disputed work, but also that the record in other recent cases before the Board underscores this as well. See, e.g., *Electrical Workers Local 98 (Total Cabling Specialists)*, 337 NLRB 1275 (2002); *Electrical Workers Local 98 (NFF Construction, Inc.)*, 332 NLRB 1262 (2000); *Electrical Workers Local 98 (Honeywell Inc.)*, 332 NLRB 526 (2000); *Electrical Workers Local 98 (AIMM, Inc.)*, 331 NLRB 1075 (2000); *Electrical Workers Local 98 (Kastle Security)*, 324 NLRB 728 (1997); *Electrical Workers Local 98 (LaSalle University)*, 324 NLRB 540 (1997); *Electrical Workers Local 98 (Lucent Technologies)*, 324 NLRB 226 (1997) (Board issues broad areawide award against Local 98 because of likelihood of dispute's recurrence and union's proclivity to violate the Act); and *Electrical Workers Local 98 (Lucent Technologies)*, 324 NLRB 230 (1997) (Board issues broad areawide award against Local 98 because of likelihood of dispute's recurrence and union's proclivity to violate the Act).

We further note that on July 1, 2002, the Board decided to pursue civil contempt proceedings against both Local 98 and Della Vella as a result of the conduct underlying the dispute in the instant case. In a separate case issued 3 years ago, the Board found that Local 98 violated Sec. 8(b)(4)(i) and (ii)(B) of the Act at several construction sites in the Philadelphia area. *Electrical Workers Local 98 (Telephone Man)*, 327 NLRB 593 (1999). In that case, the Board adopted the judge's conclusion that Local 98's "unlawful actions toward 10 separate neutral employers in a 19-month period, involving picketing, threats to picket, and work stoppages at six locations in the Philadelphia area, demonstrates [Local 98's] proclivity for violating the Act and its general disregard for the fundamental rights of employees and neutral employers." 327 NLRB at 602. The Board determined that a broad cease-and-desist order was warranted in that case. On September 29, 2000, the U.S. Court of Appeals for the Third Circuit issued its judgment enforcing the Board's order by default. One year later, the court of appeals issued a consent order which broadly prohibits Local 98 from violating Sec. 8(b)(4)(i) and (ii)(B) of the Act. The Board has now determined that Local 98's conduct underlying the instant case is in direct contempt of the Third Circuit's 2001 consent order, and will pursue civil contempt proceedings accordingly.

Swartley Brothers Engineers, Inc., to assign the disputed work to employees represented by it.

3. Within 14 days from this date, International Brotherhood of Electrical Workers, Local Union 98, AFL–CIO shall notify the Regional Director for Region 4 in writing whether it will refrain from forcing Swartley Brothers Engineers, Inc., by means proscribed by Section 8(b)(4)(D) to assign the disputed work in a manner inconsistent with this determination.